Supreme Court, U. S.
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No. 97-141

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DENNIS W. RIGGS,

Petitioner,

vs.

DOCTOR'S ASSOCIATES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals correctly determine under the particular facts of this case that respondent had not waived its right under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* to compel petitioner to arbitrate his claims against respondent in accordance with the terms of a valid arbitration agreement?

STATEMENT PURSUANT TO RULE 29.6

Doctor's Associates, Inc. has no parent company and no subsidiaries (other than wholly-owned subsidiaries).

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STATEMENT OF THE CASE

This is one in a series of appeals to the United States Court of Appeals for the Second Circuit and this Court by certain Subway sandwich shop franchisees seeking to avoid their contractual obligation to arbitrate their claims against Doctor's Associates, Inc. ("DAI"), the Subway franchisor. *See, e.g., Doctor's Associates, Inc. v. Distajo, et al.*, 107 F.3d 126 (2d Cir. 1997), *cert. pending* ("*Distajo II*"); *Doctor's Associates, Inc. v. Jabush, et al.*, 89 F.3d 109 (2d Cir. 1996) ("*Jabush*"); *Doctor's Associates, Inc. v. Stuart, et al.*, 85 F.3d 975 (2d Cir. 1996) ("*Stuart*"); *Doctor's Associates, Inc. v. Distajo, et al.*, 66 F.3d 438 (2d Cir. 1995), *cert. denied*, 116

S. Ct. 1352 (1996) ("*Distajo I*"). *See also Doctor's Associates, Inc. v. Casarotto*, 116 S. Ct. 1652 (1996). As the District Court noted below, "[t]his action is legally indistinguishable from twenty-eight prior actions that have come before this court." *See* Petitioner's Appendix ("Pet. App.") 37a.

The franchisee in this particular case is Dennis W. Riggs. Mr. Riggs operated a Subway store in Niles, Illinois, pursuant to a standard form franchise agreement with DAI. The store is located in a building that Mr. Riggs subleased from one of DAI's affiliated companies, Subway Central, Inc. ("Subway Central"). Both the franchise agreement and sublease are, in all material respects, identical to those at issue in *Distajo I* and *II*, *Stuart* and *Jabush*. The franchise agreement contains a standard American Arbitration Association ("AAA") arbitration clause, requiring arbitration, in Bridgeport, Connecticut, on demand of either party, of all "disputes arising out of or relating to the" franchise agreement.[1]

This dispute arose when Mr. Riggs stopped paying the rent required by his sublease. On May 31, 1996, Subway Central filed suit against Mr. Riggs in the Circuit Court of Cook County, Illinois, seeking to regain possession of the premises

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[1] The arbitration clause provides as follows:

> Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut, and judgement upon an award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. The commencement of arbitration proceedings by an aggrieved party to settle disputes arising out of or relating to this contract is a condition precedent to the commencement of legal action by either party. Each party will be responsible for their own costs in conjunction with the arbitration proceeding. If Franchisee commences action in any court prior to an arbitrator's final decision on the controversy or claim, then the Franchisee will be responsible for all expenses incurred by the Company and Franchisee in the arbitration and the court proceedings.

and to recover back rent and related charges totalling $10,313.79. *See Subway Central, Inc. v. Riggs*, No. 96M1716579 1402 (Cir. Ct. of Cook County, Ill. filed June 17, 1996). The sole basis for eviction alleged by Subway Central was Mr. Riggs's failure to pay the rent required by the sublease; Subway Central never asserted a breach of the franchise agreement as a ground for the eviction. In the eviction action, Mr. Riggs never disputed that he was behind on the rent, and he never challenged the amount that Subway Central sought to recover or denied that his rent default was a material breach of the sublease, entitling Subway Central to possession of the premises.

On June 18, 1996, approximately two weeks after the eviction action was filed, and before any activity of substance had occurred in that action,[2] Mr. Riggs and his corporation filed a lawsuit in the United States District Court for the Northern District of Illinois against DAI, Subway Restaurants, Inc., Subway Central, and DAI's owners, Frederick A. DeLuca and Peter H. Buck. *See Riggs v. Subway Restaurants, Inc.*, No. 96 C 3690 (N.D. Ill. filed June 18, 1996). The complaint alleged, among other things, that DAI had waived its right to arbitrate by causing Subway Central to file the eviction action, that defendants had defrauded Mr. Riggs into entering into the franchise agreement, and that the defendants had violated the Illinois Franchise Disclosure Act and the Illinois Consumer Fraud and Deceptive Business Practices Act. *Id.*; *see* Pet. App. 36a. Mr. Riggs sought rescission of the franchise agreement, over $150,000.00 in actual damages, and an unspecified amount of punitive damages. Mr. Riggs never asserted in the eviction action any of his claims in the federal lawsuit.

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[2] Mr. Riggs responded to the eviction action by claiming in his Answer that neither Subway Central nor Subway Restaurants, Inc. (which had assigned the sublease to Subway Central) was registered to do business in Illinois. He never asserted any substantive defenses. Later, Mr. Riggs voluntarily abandoned the premises and judgment entered against him on April 14, 1997, approximately nine months after DAI filed its petition to compel arbitration and seven months after the Connecticut District Court issued its judgment compelling arbitration of Mr. Riggs's claims.

Promptly after Mr. Riggs filed his lawsuit, DAI filed in the United States District Court for the District of Connecticut a petition, under section 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4, to compel arbitration of his claims and a motion to enjoin prosecution of the lawsuit pending the arbitration. *See Doctor's Associates, Inc. v. Riggs*, Civ. No. 3:96CV01334 (PCD) (D.Conn. filed July 11, 1996). Because a petition to compel under section 4 may be brought only in the federal district with jurisdiction over the contractually designated site of arbitration and because Mr. Riggs's franchise agreement with DAI calls for arbitration in Bridgeport, the District of Connecticut was the only forum where DAI could properly file its petition. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith v. Lauer*, 49 F.3d 323, 327 (7th Cir. 1995); *Snyder v. Smith*, 736 F.2d 409, 420 (7th Cir.), *cert. denied*, 469 U.S. 1037 (1984); *Maria Victoria Naviera, S.A. v. Cementos Del Valle, S.A.*, 759 F.2d 1027, 1031 (2d Cir. 1985); *Lawn v. Franklin*, 328 F. Supp. 791, 793 (S.D.N.Y. 1971).

Mr. Riggs opposed DAI's petition and alleged, among other claims, that DAI had waived its right to compel arbitration by causing Subway Central to file the eviction action. Pet. App. 40a. On July 12, 1996, the Connecticut District Court issued an order scheduling a hearing for August 1, 1996 on DAI's petition and motion for injunction. This order prompted Mr. Riggs's lawyers to file what they styled as an "emergency" motion in the Northern District of Illinois, seeking a temporary restraining order to prevent the Connecticut District Court from proceeding on DAI's petition to compel.

On July 31, 1996, the Northern District of Illinois denied Mr. Riggs's motion. *Riggs v. Subway Restaurants, Inc.*, No. 96 C 3690, Slip. Op. at 1 (N.D. Ill. July 31, 1996). The court held that the Seventh Circuit's recent decision in *Merrill Lynch, Pierce, Fenner & Smith v. Lauer*, 49 F.3d 323, 330 (7th Cir. 1995) required the court to give priority to DAI's petition to compel arbitration, because absent a facially unenforceable forum selection clause, "the question of whether one

is to be compelled to arbitrate or ... excused from arbitration belongs in the court where the arbitration is supposed to take place." *Id.* Because Mr. Riggs failed to introduce any evidence to support a claim that the arbitration agreement's selection of forum was unenforceable, the District Court Judge concluded that all issues of arbitrability "ought to be handled in Connecticut courts where arbitration must take place." *Id.*; *see* Pet. App. 39a.

After argument and briefing in the Connecticut District Court, that court compelled Mr. Riggs to arbitrate his dispute in accordance with his franchise agreement and enjoined him "until further order of this court, from commencing, prosecuting, or in any way acting in (1) any action related to or arising under any franchise agreement with DAI, and/or (2) any matter or dispute which is or may be subject to an arbitration clause in any such agreement." Pet. App. 42a. The District Court first rejected Mr. Riggs's argument that it should defer to the Illinois federal court to decide the waiver issue; since the Illinois court had **already** deferred, the court declined to "drop the ball that the Illinois court has handed it." Pet. App. 39a. The court next dismissed as "without merit" Mr. Riggs's claim that state law governs waiver of the right to arbitrate under the FAA. Pet. App. 39a-40a. Finally, noting that "[t]his action is largely indistinguishable from twenty-eight prior actions that have come before this court," including *Distajo I* and *II*, *Stuart* and *Jabush*, the District Court rejected petitioner's waiver arguments. According to the court, its rejection of the waiver defense in *Distajo II* "is applicable here." Pet. App. 40a-41a.

In an unpublished summary order, the Second Circuit affirmed the District Court. Pet. App. 31a-33a. Noting that the Second Circuit's own opinion in *Distajo II*, which was decided after the District Court's decision, resolved many of the same issues raised by Mr. Riggs, the court concluded that "we have reviewed all of the defendant's claims and find them to be without merit." Pet. App. 33a.

As both the Second Circuit and the District Court noted, the franchisees in *Distajo II* had raised waiver claims and presented factual circumstances that were virtually identical to those asserted by Mr. Riggs. After carefully reviewing the pleadings in the eviction actions and the franchisee lawsuits, the Second Circuit in *Distajo II* concluded that in the eviction actions that, like *Riggs*, were based solely upon a breach of the sublease, DAI had not litigated any arbitrable claims and, therefore, had not waived its right to demand arbitration.[3] *Distajo*, 107 F.3d at 132 n.11. Thus, the court expressly rejected the franchisees' claim that these eviction actions arose from the "same core facts" as the franchisees' claims for breach of the franchise agreement. *Id.* at 133. When its affiliates filed the eviction actions, therefore, DAI did not waive its right to arbitrate the entirely separate claims that the franchisees later raised in their lawsuits. *Id.* Finally, even though the Second Circuit noted that "[s]trictly speaking, in view of our holding above, it is not necessary for us to decide whether the franchisees suffered prejudice from being subject to these eviction actions," the court stated that the franchisees "did not suffer the type of prejudice that supports a finding of waiver." *Id.* at 133-34.

Both Mr. Riggs and the franchisees in the *Distajo II* case have now filed petitions for certiorari. Petition ("Pet.") 8. Significantly, however, the franchisees in *Distajo II* have **not** challenged the Second Circuit's holdings on waiver.

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[3] The eviction actions against certain *Distajo II* franchisees included allegations that the franchisees had breached the franchise agreement as well as the sublease. Nevertheless, the Second Circuit concluded that even in those eviction actions DAI had not litigated **any** of the legal or factual issues that were presented in the franchisees' lawsuits against DAI. *Id.* at 132-33. The eviction action against Mr. Riggs was based solely on an alleged breach of the sublease and did not involve the franchise agreement at all.

REASONS FOR DENYING THE PETITION

Petitioner's arguments for certiorari depend on his claim that the Second Circuit held that petitioner was required to make a showing of prejudice in order to warrant a finding that DAI had waived its right to arbitrate its disputes with petitioner. From that essential premise, petitioner asserts that the Second Circuit's decision conflicts with decisions of this Court, the Seventh Circuit and other federal courts. For several reasons, the Petition should be denied.

First, the opinion below is an unpublished, fact-specific decision that expressly states that it has no precedential value; it, therefore, does not warrant review by this Court.

Second, the premise of petitioner's arguments is false. Neither the Second Circuit's decision in *Riggs*, nor even its decision in *Distajo II*, holds that DAI did not waive its right to arbitrate because Mr. Riggs failed to demonstrate that he was prejudiced by the eviction action. As a result, this case does not provide the Court an opportunity to address the issue of prejudice that the Petition presents.

Third, the supposed conflict with decisions of this Court or the Seventh Circuit is also illusory. None of the decisions of this Court cited by petitioner held that the issue of waiver of rights to arbitrate under the FAA should be determined by state law. To the contrary, those decisions confirm what numerous lower courts, including the Seventh Circuit, have expressly held: whether a party has waived its federal right to compel arbitration under the FAA is a matter of federal, not state, law.

I. THE SECOND CIRCUIT'S FACT-BOUND NON-PRECEDENTIAL DECISION DOES NOT WARRANT REVIEW.

The Court has consistently stated that writs of certiorari will not issue "except in cases involving principles the settlement of which is of importance to the public, as distinguished from [ ] the parties..." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923); *see Rice v. Sioux City*

Cemetery, 349 U.S. 70, 79 (1955). The Court has also repeatedly stated that other than in exceptional circumstances not presented here, it will not review fact-specific determinations by the lower courts. *United States v. Johnston*, 268 U.S. 220, 227 (1925) (court will not review evidence or factual findings); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) (court will not review findings of fact without exceptional show of error). Here, the Second Circuit's summary order provides no legal analysis or conclusions for review. By its terms, the summary order has no precedential value and is limited to its facts. The Second Circuit's fact-specific decision thus has importance only to the parties and does not present any issue of public importance. It does not warrant this Court's review.

II. THIS CASE DOES NOT PROVIDE AN OPPORTUNITY TO ADDRESS THE PREJUDICE ISSUE PRESENTED BY THE PETITION.

Each of the arguments for certiorari advanced by petitioner turns on his claim that the Second Circuit required as a condition to a waiver finding a showing that the eviction action prejudiced Mr. Riggs. Pet. 6. Thus, the contention that Illinois law should determine whether a party to an arbitration agreement has waived its right to compel arbitration under the FAA, as well as the assertion that the Seventh and Second Circuits have issued conflicting decisions on the standard for determining waiver, are entirely dependent upon petitioner's claim that the Second Circuit in this case erroneously rejected his waiver claim because he failed to show prejudice. Pet. 12-13.

The Second Circuit did no such thing. Nowhere in its summary order in *Riggs* did the Second Circuit state or hold that petitioner's waiver defense failed because he could not show that he was prejudiced by Subway Central's filing of the eviction action. Pet. App. 32a-33a. While the court did cite to and rely upon its decision in *Distajo II*, the decision that is the real focus of the Petition, that decision also was not founded upon the franchisees' failure to show prejudice. Instead,

Distajo II is explicitly based on the Second Circuit's determination that DAI had not litigated in any of the eviction actions the factual or legal issues raised in the franchisees' lawsuits, a fact-specific determination that neither Mr. Riggs nor any of the *Distajo II* franchisees even challenge in their petitions.

1. The Second Circuit began its analysis of the waiver issue in *Distajo II* by citing the well-established general rule that "waiver of the right to arbitrate occurs when a party 'engages in protracted litigation that results in prejudice to the opposing party.'" 107 F.3d at 131 (*citing Cotton v. Slone*, 4 F.3d 176, 179 (2d Cir. 1993); *Kramer v. Hammond*, 943 F.2d 176, 179 (2d Cir. 1991)). *See also Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 25 (2d Cir. 1995). The court noted that the District Court in *Distajo II*, as in *Riggs*, had rejected the franchisees' waiver claim solely on the basis that the franchisees had not shown prejudice. Significantly, however, the Second Circuit stated, "[w]e do not believe we are so constrained." 107 F.3d at 131. As a result, even before turning to the issue of prejudice, the court as a threshold matter first looked at the pleadings in the eviction actions and the franchisees' lawsuits to determine whether in the eviction actions DAI's affiliates had engaged in **any** litigation, let alone "protracted litigation," of the same issues that the franchisees' lawsuits presented. As the Second Circuit noted, courts of appeals agree that waiver of the right to arbitrate can be found only when a party has previously litigated the same claims it now seeks to arbitrate. *Id.* at 133. *See also Gingiss Int'l, Inc. v. Bormet*, 58 F.3d 328, 330-32 (7th Cir. 1995); *Lawrence v. Comprehensive Business Services Co.*, 833 F.2d 1159, 1164-65 (5th Cir. 1987).

After a careful review of the facts of each case, the *Distajo II* court determined that none of the prior eviction actions involved the same legal and factual issues raised by the franchisees in their state suits: "The eviction actions were simple collection proceedings to recover relatively small amounts of unpaid fees and rents . . . In contrast, the franchisees' state suits, filed several months to one year after the evictions, allege various violations by DAI of the franchise agreement and

attack the validity of the franchise agreement and arbitration clause on a host of different federal and state law grounds." *Id.* As the court cogently observed, "'[t]here is no conceivable policy justification for a rule that, by exercising the reasonable business judgment to sue to evict someone from leased premises or to collect a debt of less than $10,000, a party waives for all time its right to arbitrate every other dispute imaginable, including multimillion dollar punitive damage claims of which the party has no knowledge when it files the eviction action.'" *Id.* at 132-133.

Because of this factual determination by the Second Circuit in *Distajo II*, the court explicitly stated that it was "not necessary for [the court] to decide whether the franchisees suffered prejudice from being subjected to eviction actions." *Id.* at 133-34. Though the court commented in a single sentence in its opinion that the franchisees had also not suffered prejudice from the filing of the eviction actions, this statement is clearly *dicta*. Thus, at best the Petition improperly asks this Court to review *dicta* in the Second Circuit's decision in *Distajo II*, where it is not even apparent that the Second Circuit relied upon that *dicta* in rejecting Mr. Riggs's claim of waiver. [4]

2. The eviction action against Mr. Riggs was based solely on his failure to pay rent under the sublease. Mr. Riggs never denied that he was in default under the sublease or challenged the amount owed. His only response to the eviction action was to file an Answer and Motion to Dismiss on the grounds that the plaintiffs were not registered to do business in Illinois. Thus, there was no litigation of any issue in the eviction action -- let alone protracted litigation -- before the petition to compel arbitration was filed and, as in *Distajo II*, no litigation

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[4] The Second Circuit in *Distajo II* also affirmed the District Court's ruling that if the eviction action was based solely on the franchisee's failure to pay rent under the sublease, as was the case with Mr. Riggs, DAI could not have waived its right to arbitrate other arbitrable claims. *Distajo*, 107 F.3d at 132 n.11; *See Doctor's Associates, Inc. v. Distajo, et al.*, 944 F.Supp. 1010, 1020 (D. Conn. 1996). This ruling, which Mr. Riggs has not challenged, also disposes of petitioner's waiver claim.

at all on the franchise agreement and fraud claims that Mr. Riggs later raised in his federal lawsuit. Petitioner does not, and cannot, contest these facts. Accordingly, under the undisputed facts and well settled law in all circuits, the Second Circuit was correct in concluding that DAI had not waived its right to compel arbitration under the FAA because in the eviction action DAI had not litigated any of the issues raised in Mr. Riggs's lawsuit. *Id.* at 133-34. *See, e.g., Leadertex, Inc. v. Morgantown Dyeing & Finishing Corp.*, 67 F.3d at 25; *Gingiss Int'l, Inc. v. Bormet*, 58 F.3d at 330-32; *Lawrence v. Comprehensive Business Services Co.*, 833 F.2d at 1164-65.

Because there is an independent and adequate factual basis to support the Second Circuit's waiver decision that Mr. Riggs does not even challenge in his Petition (i.e., that there was no litigation of any issue in the Riggs eviction action before the petition to compel was filed) and because the Second Circuit in *Riggs* did not discuss the issue of prejudice, this case does not present the Court with an opportunity to address the issue of prejudice on which the Petition is based.

III. THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER FEDERAL COURTS.

For the reasons set forth above, this case does not present the Court with an opportunity to address the purported conflicts on the issue of prejudice that the Petition presents. Moreover, the conflict that Mr. Riggs seeks to manufacture simply does not exist.

1. Petitioner first claims that the Second Circuit's decision that federal law governs whether DAI waived its right to compel arbitration under the FAA is in conflict with decisions of this Court, which allegedly hold that state law applies to such issues. Pet. 10-11. In fact, however, not one of the Supreme Court decisions relied upon by petitioner holds that waiver of rights under the FAA is an issue determined under state law. If anything, this Court's decisions applying the FAA support the Second Circuit's conclusion that federal law governs whether a party to a valid arbitration agreement has

waived its federal right to seek to compel arbitration under the FAA.

The Court has repeatedly recognized that the FAA constitutes "a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). To ensure that valid arbitration agreements are enforced in state and federal courts, Congress enacted the FAA to "create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act..." *Id.* Thus, in *Moses H. Cone*, the Court held that "**as a matter of federal law**, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an **allegation of waiver**, delay or a like defense to arbitrability." *Id.* at 25 (emphasis added). The Court recently reaffirmed this holding from *Moses H. Cone* that federal law governs issues such as waiver. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1218 n.8 (1995).

Far from conflicting with the decision of the Second Circuit, each of the decisions cited by petitioner also supports the conclusion that federal law governs the waiver claim. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 862 (1984); *Perry v. Thomas*, 42 U.S. 483, 107 S. Ct. 2520 (1987); *Allied Bruce Terminix Co., Inc. v. Dobson*, 115 S. Ct. 834 (1995); *Doctor's Associates, Inc. v. Casarotto*, 116 S. Ct. 1652 (1996). These cases all hold that the FAA should be broadly interpreted to promote the strong **federal** policy favoring arbitration and that any state statute, common law or procedural rule that interferes with the enforcement of a valid arbitration agreement violates the Supremacy Clause. *E.g., Casarotto*, 116 S. Ct. at 1656. Thus, this authority confirms what this Court explicitly stated in *Moses H. Cone* -- federal law governs a claim that a party to a valid arbitration agreement has waived the federal rights that Congress established in the FAA. Any other rule would undermine Congress's

intent to make arbitration agreements enforceable as a matter of federal law. *Terminix*, 115 S. Ct. at 840.

Relying upon *Moses H. Cone* and other decisions from this Court, numerous federal courts, including the Seventh Circuit, have held that federal law governs the waiver of rights under the FAA. *Cabinetree v. Kraftmaid Cabinetry*, 50 F.3d 388 (7th Cir. 1995) (applying federal law and precedent to waiver defense); *Lawrence v. Comprehensive Business Services Co.*, 833 F.2d 1159 (5th Cir. 1987) (applying federal law to waiver defense); *Brown v. E.F. Hutton & Co., Inc.*, 610 F. Supp. 76 (S.D. Fla. 1985) (same); *Redshaw Credit Corp. v. Insurance Professionals, Inc.*, 709 F. Supp. 1032 (D. Kan. 1989) (same); *Realco Enterprises, Inc. v. Merrill Lynch, Pierce, Fenner & Smith*, 738 F. Supp. 515 (S.D. Ga. 1990) (same). As one noted commentator on the FAA has succinctly put it: "The substantive law of arbitration waiver is federal". Ian R. MacNeil, *et al.*, *Federal Arbitration Law* at 10:65 (1995). Accordingly, the Second Circuit's decision is not in conflict with any decision of this Court.

2. There also is no conflict between the Second Circuit's decisions in *Riggs* and *Distajo II* and the Seventh Circuit's opinion in *Cabinetree*.

First, *Cabinetree* is completely distinguishable from the facts of this case. In *Cabinetree*, the franchisee filed suit against the franchisor in state court. *Cabinetree*, 50 F.3d at 389. Rather than immediately petitioning to compel arbitration, as DAI did here, the franchisor in *Cabinetree* removed the case to federal court and then engaged in extensive discovery, obtaining thousands of pages of documents from the franchisee. After months of extensive and protracted litigation and after a trial date had been set, the franchisor moved to compel arbitration of the identical claims that the franchisor had been litigating for almost a year. *Id.* Based on these unique facts, the Seventh Circuit held, as a matter of federal law, that it would presume that the franchisor had waived its rights to compel arbitration, a holding that has absolutely no application to this case. *Id.* at 390.

Second, the Seventh Circuit in *Cabinetree* specifically held that in the absence of such extreme facts, a party's prior participation in litigation should not constitute waiver absent a showing of prejudice to the other party. *Id.* at 391. This holding is fully consistent with the Second Circuit's ruling in *Distajo II* that "waiver of the right to arbitrate occurs when a party 'engages in protracted litigation that results in prejudice to the opposing party.'" *Distajo*, 107 F.3d at 131. There are, therefore, no conflicts in the circuit courts for this Court to resolve.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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